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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2718 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.

2. To be referred to the Reporter or not? Yes.

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3. Whether Their Lordships wish to see the fair copy
of the judgement? No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge?

No.

ODE SEVA SAHKART MANDIT

Versus

MANIBHAI RANCHHODBHAI PATEL

Appearance:

MR DEEPAK V PATEL for Petitioner

MR DC DAVE for Respondent No. 1, 2, 3

CORAM : MR. JUSTICE S.D.PANDIT

Date of decision: 21/08/98

CAV JUDGEMENT

Rule. In facts and circumstances of the case the

petition is taken up for final hearing by issuing the rule. The learned advocate for the respondents Mr. Dhaval C. Dave waives service of notice of rule.

2. The petitioner-Ode Seva Sahkari Mandli, a society has filed the present petition to challenge the award passed by the Labour Court of Anand in Reference No.229/92 (Old Reference No.788/86) on 7.10.97.

3. It is the case of the petitioner-society that society is running a small shop for distribution of foodgrains and fertilizers, and only four employees are in employment. It is further contended that petitioner-society will not become an industry under section 2(j) of the Industrial Disputes Act. Consequently, the Labour Court had no jurisdiction to entertain the original proceeding and to decide the controversy between the petitioner and the respondents.

4. Respondents no.1 and 2 were working as Clerks, whereas, respondent no.3 was working as a Peon. One Kanubhai Patel was the Secretary of the said co-operative society. It is the claim of the petitioner that said Kanubhai Patel with collusion with the present respondents committed financial irregularities and misappropriation for the period running between 1.7.84 and 31.12.85. The said facts were brought to the notice when the Special Auditor had audited the accounts of the society. On the strength of his Audit Report, a Criminal Case bearing No.219/88 was lodged against the present respondents as well as against the said Kanubhai Patel. Similarly, a Lavad Suit No.2/86 was lodged against the said Kanubhai Patel and Lavad Case No.486/86 was also lodged against the respondents and the said proceedings are pending. The Secretary Kanubhai was absconding since the time of the audit and therefore the criminal trial against him could not proceed in the said criminal prosecution. The respondents were acquitted in criminal trial by giving benefit of doubt. It is the claim of the petitioner that because of the said involvement of the respondents, the respondents themselves had abstained from reporting for work and instead of reporting for work, they have raised an industrial dispute which resulting into reference in question and the award in question.

5. It is contended on behalf of the petitioner that petitioner is not an industry and the Labour Court had no jurisdiction. It is further contended that in view of the involvement of the respondents in the financial irregularities, the petitioner had lost confidence in

them and therefore they could not be reinstated in service. It is further contended that the respondent no.1 has attained the age of superannuation in the year 1992, therefore, because of the same also he could not be reinstated. Thus, it is contended that order of the Labour Court should be quashed and set aside.

6. The respondents have contested the claim of the petitioner by filing affidavit-in-reply. It is contended by them that the claim of the petitioner that there are only four employees and that they are running only one shop for sale and distribution of the foodgrains and fertilizers is false. It is contended that the petitioner has also acquired an agency for Liquified Petroleum Gas, and has also installed a weighing scale for the purpose of providing a facility of weighing cargoes loaded in a truck. The petitioner is also giving financial assistance and having more than 10 employees in the employment. It is further contended that the claim of the petitioner that they were involved in the financial irregularities is false. The financial irregularities were committed by Kanubhai. The said Kanubhai was brother-in-law of the Chairman of the Society. He is absconding since 22nd December 1985 and they were falsely impleaded in the criminal prosecution. Thus they contended that they were terminated from the job without any reason. They denied that they themselves had abandoned their jobs. Thus they contended that the Labour Court has recorded the finding of granting the reinstatement with backwages on appreciation of the oral evidence, and there are no ground to interfere with the said findings by exercise the power under Article 226 and 227 of the Constitution of India. Thus they contended that the petition be dismissed with costs.

7. From the award of the Labour Court, it would be quite clear that as a matter of fact, the contention which the petitioner has raised before this court namely that petitioner is not an industry within the meaning of section 2(j) of Industrial Disputes Act, was not raised before the Labour Court. The petitioner has raised a specific contention that petitioner was running only one shop for sale and distribution of foodgrains and fertilizers, and they had employed only four employees in the said shop. Consequently, they would not become an industry within the meaning of section 2(j) of the Industrial Disputes Act. This contention raised by them is the contention which is going to the root of the matter, the question as to whether the petitioner is an industry is a mixed question of fact and law. But merely they had not raised the contention before the Labour

Court, it could not be said that their contention need not at all be considered by this court particularly when the petitioner is admittedly a co-operative society. The contention which ought to have been taken by the petitioner which goes to the root of the matter could not be discarded and taken out of the consideration merely on account of the delay on the part of the petitioner. The delay could be adequately compensated by awarding cost to the respondents. As stated earlier, the question as to whether the petitioner is an industry within the meaning of section 2(j) of Industrial Disputes Act, is a mixed question of law and fact, and therefore, the matter will have to be remanded to the Labour Court to consider the said contention and to decide the same. This is more necessary in view of the pleading of the respondents. According to the respondents, the claim of the petitioner that they have got only one shop is false. According to them they have got shops nodoubt they have not mentioned specifically how many shops but they have got shops. They have further stated that they have acquired an agency for Liquified Petroleum Gas and installed a weighing scale for weighing cargoes loaded in a truck. They have further contended that in all these activities, they have employed more than 10 employees. When this contention is raised by the respondents, they must have an opportunity to produce the evidence to support their contention. Therefore, in these circumstances, I hold that the question as to whether the petitioner is an industry or not could not be decided for the first time by this court in the proceeding under Article 226 and 277 of the Constitution of India, when the said decision is dependent on facts and a finding of fact. As stated earlier there ois delay on the part of the petitioner, I would, therefore, direct the petitioner to pay the cost of Rs.2000/- each of the respondents and they should amend their statements filed before the Labour Court by raising the contention regarding their claim that they are not an industry. I am awarding this cost in view of the fact that the respondents are out of job since 1986 and there was already an award in their favour since 7.10.97 and this petition is pending in this court from 2nd April, 1998. The respondents were entitled to get the wages under section 17 B during the pendency of this proceedings for nearly four months in this court. Therefore, taking into consideration all these aspect as well as the fact that the respondents are out of job and there was already an award in their favour, the costs is awarded to them.

8. While remanding the matter to the Labour Court, I would also like to bring to the notice to the Learned

Labour Court two other contention raised on behalf of the petitioner. It is contended on behalf of the petitioner that the respondent no.1 has attained the age of superannuation in the year 1992. The Learned Labour Court should investigate this claim and consider the question, in case if the Labour Court happened to come to the conclusion that there was wrongful retrenchment of the respondents as what relief should be granted to the respondent no.1 in view of his attaining the age of superannuation in the year 1992.

9. Similarly, it is also contented before me that the petitioner had lost confidence in the respondents in view of the involvement in the criminal prosecution though they are acquitted and therefore the petitioner should not be forced to reinstate the respondents. The Labour Court should consider the said contention of the petitioner and if the Labour Court found that there is some substance in the contention then to consider what relief to be granted to the respondents in view of the same.

10. Thus, in view of the fact that the contention regarding the petitioner being not an industry is taken for the first time and as I feel that the said contention is to be considered and decided by the trial court, I remand the matter to the Labour Court. I would therefore direct the parties to appear before the Labour Court on or before 28th September 1998. The petitioner should file an application for amendment of his statement in order to incorporate it's claim that the petitioner is not an industry, the said amendment be allowed by the Labour Court. Each of the respondents is to be paid Rs.2,000/by the petitioner for allowing the petitioner to raise such contention at this stage. The said cost should be paid by the petitioner within four weeks from today, in case if the petitioner fails to pay the said cost, the petition of the present petitioner shall stand dismissed and award passed by the Labour Court shall stand confirmed on account of their failure to abide the order passed by this court. After allowing the said amendment, the Labour Court should expedite the hearing of the proceedings by giving an opportunity to both the sides to lead additional as well as giving opportunity to reexamine and cross-examine the witnesses already examined. The Labour Court should decide the reference by taking into consideration the observations made in this judgment on or before 31st December, 1998.

11. Rule is made absolute in the above terms. But in

the circumstances of the case, I would direct the parties to bear their respective costs.

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